Office-Supreme Court, U.S.
FILED
MAR 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 985

WALTER ELY and STUART L. KADISON,

Petitioners,

vs.

THE OFFICIAL CREDITORS' COMMITTEE OF FOX MARKETS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOHN J. QUINN, JR.,
550 South Flower Street,
Los Angeles, Calif. 90017.
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented for review	2
Constitutional provisions, Federal statutes and regulations involved	4
Statement	6
Reasons for granting the writ	9
In general	9
A. The circuit conflict	10
B. The confusion among the circuits and the importance of dispelling that confusion	17
C. The special panel so far departed from the accepted and usual course of judicial procedure as to deny petitioners due process of law	18
Conclusion	21
Appendix A. Findings of Fact, Conclusions of Law, and Order	App. p. 1
Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 12

TABLE OF AUTHORITIES CITED

Cases	Page
Barceloux, In re, 74 F. 2d 288	11, 14
Brown v. Gerdes, 321 U.S. 178	13
Butzel v. Webster Apartments Co., 112 F. 2d 362	12
Cargill v. Levinson, 125 F. 2d 704	13
Charles Ray Glass, Inc., In re, 47 F. Supp. 428	15
Chicago & West Towns Rys., Inc. v. Friedman, 230 F. 2d 364, cert. denied, 351 U.S. 943	15, 16
Dee v. United Exchange Bldg., Inc., 88 F. 2d 372	12
Detroit Internat'l Bridge Co., In re, 111 F. 2d 235	12, 14
Dunnhill Suspender & Belt Corp., In re, 162 F. Supp. 608	14
Finn v. Childs Co., 181 F. 2d 431	13
Glove Paper Co. v. Morris Travis Drug Co., 112 F. 2d 350	16
International Power Securities Corp., In re, 112 F. Supp. 46	12
Levin v. Barker, 122 F. 2d 969, cert. denied, 315 U.S. 813	12, 14
Mt. Forest Fur Farms of America, Inc., In re, 157 F. 2d 640	13, 14
Mountain States Power Co., In re, 118 F. 2d 405	13, 14
Newton v. Consolidated Gas Co., 259 U.S. 101	15
Oklahoma Ry. Co. v. Johnston, 155 F. 2d 500	12, 14
Owl Drug Co., In re, 16 F. Supp. 139	12
Paramount Merrick, Inc., In re, 252 F. 2d 482	14

Page

Seed Marketing Assoc., Inc., In re, 228 F. Supp. 812 12

Smith v. Central Trust Co., 139 F. 2d 733 13

Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 226 F. 2d 862 12

Universal Lubricating Systems, Inc., In re, 165 F. 2d 664 14

West Counties Const. Co., In re, 182 F. 2d 409 ..12, 13

Rules

Rules of the United States Supreme Court, Rule 23 .....3, 5, 20

Statutes

Bankruptcy Act, Sec. 241 .....3, 4, 10, 12, 16, 17

United States Code, Title 11, Sec. 641 ....3, 4, 10, 12, 17

United States Code, Title 28, Sec. 650 9

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Fifth Amendment 4

Textbooks

3 Collier on Bankruptcy (14th ed. 1964), Par. 62.12, pp. 1491-1492 14

36 Journal of the National Association of Referees in Bankruptcy, p. 56 19

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

WALTER ELY and STUART L. KADISON,

Petitioners,

vs.

THE OFFICIAL CREDITORS' COMMITTEE OF FOX MARKETS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Walter Ely and Stuart L. Kadison respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit made and entered in the above case on October 20, 1964, modifying, and as modified, affirming the order of the United States District Court for the Southern District of California made and entered September 5, 1963.

Opinions Below.

There was no reported opinion of the United States District Court for the Southern District of California, Central Division, other than its Findings of Fact, Con-

clusions of Law and Order, made September 5, 1963, appended hereto as Appendix "A." The opinion of the United States Court of Appeals for the Ninth Circuit, made October 20, 1964, reported at 337 F. 2d 461 is appended hereto as Appendix "B."

Jurisdiction.

(i) The decree of the United States Court of Appeals for the Ninth Circuit was dated and entered October 20, 1964.

(ii) The order denying petitioners' Petition for Rehearing was dated and entered December 15, 1964.

(iii) It is believed that the statutory provision conferring on the Supreme Court of the United States jurisdiction to review the judgment or decree in question is Title 28 U.S.C. § 1254(1).

Questions Presented for Review.

Owing to the appointment of petitioner Ely as a judge of the United States Court of Appeals for the Ninth Circuit, Hon. Richard H. Chambers, Chief Judge of that circuit, designated a special panel of senior federal judges from areas other than California to constitute the Court before which the appeal from the order of the District Court was heard.*

The issue on appeal was whether the United States District Court abused its discretion in awarding $170,000 as fees to petitioners jointly, for services rendered

*Hon. James E. Major, Senior Judge, United States Court of Appeals for the Seventh Circuit; Hon. Thomas F. McAllister, Senior Judge, United States Court of Appeals for the Ninth Circuit; Hon. Walter J. LaBuy, Senior Judge, United States District Court for the Northern District of Illinois.

as associate counsel for the trustee in a proceeding for reorganization of Fox Markets, Inc. under Chapter X of the Bankruptcy Act. The award had been made after a full hearing extending over seven court days, and was supported by extensive findings of fact. The Court of Appeals concluded that the fee allowance was excessive, and took it upon itself, without remanding the case with instructions, to reduce it by $120,000, modifying the order of the District Court to provide a total compensation of $50,000 and affirming the order as modified. The questions presented for review are:

1. Whether the special panel properly applied the standard of reasonable compensation embodied in Section 241 of the Bankruptcy Act (11 U.S.C. § 641).

2. Whether petitioners were denied due process of law through the submission of their cause to a panel which, by reason of extrinsic facts and circumstances in no way related to, or reflecting upon, the integrity, general skill or fairness of the distinguished judges composing it, was unqualified to substitute its judgment for that of the highly qualified trial court; and whether under all of the circumstances, had the special panel deemed that the award was excessive, due process of law could have been afforded petitioners only (i) by a remand of the case with instructions, if the panel had been so inclined, as to further proceedings at the fact-finding level, or (ii) a hearing *en banc*, as suggested in the Petition for Rehearing pursuant to Rule 23 of the Court of Appeals for the Ninth Circuit.

Constitutional Provisions, Federal Statutes and Regulations Involved.

The constitutional provision which the case involves is Amendment V to the Constitution of the United States which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The federal statute which the case involves is Section 241 of the Bankruptcy Act (11 U.S.C. § 641), which reads as follows:

> "§ 641. Petitioning creditors; court officers; attorneys therefor
>
> "The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—
>
> (1) by a referee;
>
> (2) by a special master;
>
> (3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 68 and 76 of this title. July 1, 1898, c. 541, § 241, as added June 22, 1938, c. 575, § 1, 52 Stat. 900."

Rule 23 of the United States Court of Appeals for the Ninth Circuit reads in pertinent part as follows:

"RULE 23. REHEARING.

* * * * *

"All petitions for rehearing, and motions for extensions of time to file them, shall be addressed to and be determined by the court as constituted in the original hearing.

"Should a majority of the court as so constituted, either from a suggestion of a party or upon its own motion, be of the opinion that a case assigned to such court should be originally heard en banc, or after a hearing by a panel should be reheard en banc, it shall so inform the Chief Judge, requesting that the assignment of the case to the court as originally constituted be withdrawn. The Chief Judge shall thereupon convene the active judges of the court and the court as so convened shall thereupon determine whether the assignment of the case to the court as originally constituted shall be withdrawn and the case be heard or reheard en banc.

[Effective December 13, 1961]".

Statement.*

Petitioners undertook various engagements, by order of the District Court, commencing on March 26, 1962, to render services as Special Counsel to the Trustee under Chapter X of the Bankruptcy Act in the matter of Fox Markets, Inc. and related corporations [C. T. pp. 283, 736-737, 756-757, 796-797]. An unsuccessful attempt to arrange the affairs of the debtor under Chapter XI of the Bankruptcy Act had been commenced and in progress since March 7, 1961 and the Chapter X proceeding was instituted on March 7, 1962 [C. T. pp. 2-3, 243-249].

Fox Markets, Inc., the debtor, had operated a large chain of supermarkets and drug stores throughout Southern California and Southern Nevada, producing gross annual sales of approximately $80,000,000 [C. T. p. 94; R. T. p. 68, line 25, to p. 69, line 8]. At the time of the filing under Chapter X, according to the testimony of the trustee, it appeared that two pivotal stores (Stores 7 and 62) in the grocery chain were about to be lost, and he feared that with their loss the entire reorganization would probably fail [R. T. p. 73, lines 12-23].

In the course of the earlier unsuccessful proceedings under Chapter XI, the Referee in Bankruptcy had, on petitions for reclamation filed by the respective land-

*Page references to the Reporter's Transcript of Proceedings and to the Clerk's Transcript of Record on Appeal are preceded by "R. T." and "C. T." respectively.

lords, made his orders terminating the rights of the debtor to the possession of Stores 7 and 62 [C. T. pp. 167-173, 218-219, 239-240, C. T. No. 18343, pp. 105-107]. The trustee testified without contradiction, that

> ". . . at the time of Mr. Ely's and Mr. Kadison's appointments, we were faced with an order of the Referee in Bankruptcy granting the landlords of two of our best stores a judgment terminating their leases and directing the receiver to turn back possession of those stores" [R. T. p. 72, line 23, to p. 73, line 2].

Stores 7 and 62 were two of the highly profitable stores operated by the debtor and contributed more than 10% of the gross revenues of the debtor's estate [R. T. p. 72, line 20, to p. 73, line 11; p. 99, lines 7-12; p. 144, line 25, to p. 145, line 16; p. 178, line 3, to p. 179, line 4].

Lessors of both Stores 7 and 62 were vigorously attempting to effect their reclamations on March 26, 1962, when petitioners were employed as Special Counsel for the purpose of attempting to obtain a reversal on review, or otherwise, of the orders of the referee. Between March 26, 1962 and the award of fees, Stores 7 and 62 contributed at least $9,000,000 to the estate of the debtor and more than 10% of its gross revenue [R. T. p. 97, line 24; p. 98, lines 1-2].

Petitioners persuaded the Court to conclusions which were contrary to those reached by the Referee in Bankruptcy [C. T. pp. 452-484, C. T. No. 18343, pp.

329-341], and both stores were retained by the trustee through the efforts of petitioners.*

During the period of petitioners' engagement, the chain, which had been losing $100,000 weekly [R. T. p. 121, lines 20-21], operated at a profit [R. T. p. 144, line 25, to p. 145, line 16], and a successful reorganization of the debtor was accomplished in the Chapter X proceeding [R. T. p. 467, lines 10-21; p. 469, lines 8-13].

The reorganization was on advantageous terms to the debtor and its creditors. At the time of the commencement of the proceedings, the unsecured creditors had a reasonable expectation of receiving approximately seven cents for each dollar of indebtedness, or an aggregate of $1,400,000. Under the reorganization they received assets of a value of seventeen cents for each dollar of indebtedness, or an aggregate of $3,400,000. Assuming continued successful operation, there is every reasonable possibility that they will be paid in full [R. T. p. 75, lines 9-12; p. 76, lines 4-12, 13-18].

The ability of the debtor to enter into so advantageous an arrangement with Food Fair Stores, Inc. was greatly enhanced by the retention, through the efforts of petitioners, of Stores 7 and 62, and so favorable an arrangement could probably not have been made had it not been for their efforts [R. T. p. 73, lines 17-23; p. 74, lines 23-25; p. 75, lines 19-24; p. 530, lines 14-20].

Aliunde, Reorganized Fox Markets, Inc. continues to operate them, and the conclusion reached by the special panel that the stores were not regarded as essential by Food Fair Stores, Inc. (which participated in the reorganization) is neither relevant nor supported by the record.

Following the order revesting the estate in the reorganized debtor, petitioners applied for compensation. Hearings on their application were held on seven court days, and on September 5, 1963, the District Court made its order awarding them ar aggregate of $170,000. An appeal was taken and eventuated in the order of October 20, 1964 of which review on certiorari is sought herein.

Jurisdiction of the District Court was derived from Title 28, U.S.C. §650.

Reasons for Granting the Writ.

In General.

It is respectfully urged that the writ ought to be granted and the case reviewed on certiorari for the following reasons:

1. The decision rendered by the special panel, as hereinafter more fully appears, is in conflict with the decisions not only of the Ninth Circuit (for which it was acting), but also with those of the Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, and Eighth Circuit, which are, in turn, in conflict with one another. The area is one characterized by such overwhelming confusion that, it is respectfully submitted, this Court should lay it to rest.

2. The question of federal law, decided by the special panel, of vital import to all lawyers practicing in federal courts in general and in the bankruptcy field in particular, has not been, but should be, settled by this Court: *i.e.*, the criteria to be used by District Courts in applying the standard of

reason established by Section 241 of the Bankruptcy Act (11 U.S.C. § 641).

3. The special panel so far departed from the accepted and usual course of judicial proceedings as to deny petitioners due process of law and to call for an exercise of this Court's power of supervision.

A. The Circuit Conflict.

It is manifest from a reading of the opinion that the special panel based its opinion and the modification ordered thereunder primarily upon its feeling that the number of hours expended by the petitioners in behalf of the trustee and the debtor did not justify an award of the size involved. The heart of the opinion states:

> "In our view, the fallacy of the theory advanced by claimants, reflected in the testimony of their witnesses and evidently embraced by the Trial Court, is that the time element as a factor in determining a reasonable allowance was relegated to one of minor importance. We think the cases abundantly support the premise that where fees are sought by an officer of the Court under Sec. 241, the time element is of major importance, although there are other factors which may be given consideration.
>
> "In *Chicago and West Towns Railways, Inc. v. Friedman, et al.*, 230 F.2d 364, 367 (7th), the Court in discussing the fee allowances under Sec. 241 (11 U.S.C.A. Sec. 641) stated, 'Reasonable fees for such services depend largely on the hours spent and the allowance per hour.'"

(Opinion of the special panel, Appendix B, 337 F. 2d at p. 465).

In so holding, the special panel was at odds with the Ninth Circuit, for which it was acting. For example, in *In re Barceloux,* 74 F. 2d 288 (9th Cir. 1935), where the District Judge had based the allowance "particularly upon the results accomplished" (74 F. 2d at 291), the United States Court of Appeals for the Ninth Circuit affirmed, noting at page 291, that the District Judge had properly considered:

> ". . . the character, ability and experience of the attorneys, the amount involved, the time consumed in dealing with matters of the estate, the difficulty and intricacy of legal propositions to be determined, the skill employed, the responsibility and risk of the attorneys where, as here, costs and expenses of litigation were advanced, and especially the results attained. The results attained here show that the attorneys for the trustee were not only able and skillful, but met every requirement necessary for the successful conduct of the legal matters pertaining to the bankruptcy estate."

The Circuit Court went on to add (74 F. 2d at 294):

> "In determining a reasonable fee for the services rendered by the attorneys, it was necessary to consider the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results achieved, the opinion evidence touching the reasonableness of the fee, and the economical spirit of the Bankruptcy Act itself (11 U.S.C.A.)."

The criteria for determining the reasonableness of compensation to be awarded as attorneys' fees under Section 241 of the Bankruptcy Act (11 U.S.C. § 641) as applied in the *Barcelo*ux case have been generally approved and followed in a number of cases. See, for example,

Oklahoma Ry. Co. v. Johnston, 155 F. 2d 500, 502-503 (10th Cir. 1946);

Levin v. Barker, 122 F. 2d 969, 972 (8th Cir. 1941), *cert. denied,* 315 U.S. 813 (1942);

Butzel v. Webster Apartments Co., 112 F. 2d 362, 367 (6th Cir. 1940);

In re Detroit Internat'l Bridge Co., 111 F. 2d 235, 237 (6th Cir. 1940);

Dee v. United Exchange Bldg., Inc., 88 F. 2d 372, 374 (9th Cir. 1937);

In re Seed Marketing Assoc., Inc., 228 F. Supp. 812, 820-821 (D.C. Neb. 1964);

In re International Power Securities Corp., 112 F. Supp. 46, 51 (D.C. N.J. 1953);

In re Owl Drug Co., 16 F. Supp. 139, 142 (D.C. Nev. 1936).

However, while these and other cases mention many factors, perhaps the single most important criterion applied by the Circuit Courts in reviewing the size of attorney allowances is the ability of the reorganized corporation to pay.

Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 226 F. 2d 862 (2d Cir. 1959);

In re West Counties Const. Co., 182 F. 2d 409 (7th Cir. 1950);

Finn v. Childs Co., 181 F. 2d 431 (2d Cir. 1950);

In re Mt. Forest Fur Farms of America, Inc., 157 F. 2d 640 (6th Cir. 1946);

Smith v. Central Trust Co., 139 F. 2d 733 (4th Cir. 1944);

Cargill v. Levinson, 125 F. 2d 704 (5th Cir. 1942).

See,

Brown v. Gerdes, 321 U.S. 178 (1944).

Thus, allowances have been reduced because their total constituted too great a portion of the total valuation of the assets of the debtor (*see, e.g., Finn v. Childs, supra*, holding total allowances of approximately 20% of the value of the debtor's assets as excessive), or left the debtor in too weak a cash position. See, *e.g.*,

In re West Counties Const. Co., supra.

However, in at least one case the compensation awarded to the attorneys was increased on the ground that the debtor could afford to pay a larger allowance than had been granted by the lower court.

In re Mountain States Power Co., 118 F. 2d 405 (3d Cir. 1941).

The opinion of the special panel did not afford any consideration to the ability of the debtor to pay the award granted to the petitioners by the District Court. Moreover, it gave little attention to either the contention or fact that the services rendered to the trustee and debtor by the petitioners, particularly in connection with Stores 7 and 62, resulted in a substantial benefit to and preservation of the assets of the debtor. Thus, the spe-

cial panel was in conflict with a large number of cases in virtually all of the Circuits holding that the results achieved by the attorney in behalf of the trustee and debtor are to be considered a primary criterion in determining the reasonableness and amount of the fee to be awarded the attorney.

In re Paramount Merrick, Inc., 252 F. 2d 482 (2d Cir. 1958);

In re Universal Lubricating Systems, Inc., 165 F. 2d 664 (3d Cir. 1948);

In re Mt. Forest Fur Farms of America, Inc., 157 F. 2d 640 (6th Cir. 1946);

Oklahoma Ry. Co. v. Johnston, 155 F. 2d 500, 502-503 (10th Cir. 1946);

Levin v. Barker, 122 F. 2d 969, 972 (8th Cir. 1941), *cert. denied*, 315 U.S. 813 (1942);

In re Mountain States Power Co., 118 F. 2d 405 (3d Cir. 1941);

In re Detroit Internat'l Bridge Co., 111 F. 2d 235, 237 (6th Cir. 1940);

In re Barceloux, 74 F. 2d 288, 294 (9th Cir. 1935);

In re Dunnhill Suspender & Belt Corp., 162 F. Supp. 608 (S.D. N.Y. 1958).

In Moore (Editor), 3 *Collier on Bankruptcy*, Par. 62.12 at pp. 1491-1492 (14th ed. 1964), it is stated:

> "In view of the primary purpose of bankruptcy liquidation it is not surprising to find that, aside from the principle of economy, the *results achieved* constitute *the factor of greater determinative* weight." (Double emphasis added.)

While the petitioners recognize that the number of hours expended by the attorney is an element to be considered in determining the reasonableness of his fee, it is respectfully submitted that this is not the only, and as demonstrated above, certainly not the most important, criterion to be applied.

See,

In re Charles Ray Glass, Inc., 47 F. Supp. 428 (S.D. Calif. 1942).

The special panel in the instant case supported its unwarranted emphasis upon the number of hours expended by reliance upon only two cases: *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1922), and *Chicago & West Towns Rys., Inc. v. Friedman*, 230 F. 2d 364 (7th Cir.), *cert. denied*, 351 U.S. 943 (1956).

The *Newton* case did not involve a bankruptcy proceeding, but concerned an action brought by a New York gas company in which it was claimed that the maximum rate for selling natural gas prescribed by New York statutory law was confiscatory. The case was referred to a Special Master, and the question at issue was whether the amount assessed by the Master as a fee for his services was a reasonable one. The Court held his fee to be unreasonable, and based this finding primarily upon the time expended by the Master in connection with his participation in the case.

In the *Friedman* case, the Seventh Circuit stated:

> "Reasonable fees for such services [under Section 241 of the Bankruptcy Act] depend largely on the hours spent and the allowance per hour." (230 F. 2d at p. 367).

It is worthy of note that the *Friedman* case cited no authority for the proposition, and no subsequent court of any jurisdiction has followed it. Of paramount importance, of course, is the fact that the *Friedman* case is totally irreconcilable with the overwhelming weight of authority, cited above.

Apart from the fact that the opinion of the *Friedman* court and that of the special panel in the instant case are in conflict with the decisions of virtually every Circuit in the nation, there is something baffling and unrealistic about a time-based formula for determining the proper fee to be awarded under Section 241 of the Bankruptcy Act. Implicit in it is the concept that an attorney is to be penalized because his talents enable him to accomplish a given desirable result in less time than it takes his competent, but slower colleague. To assess fees on a strictly hourly rate, much as in the case of a mechanic or factory worker, seems inappropriate in fixing the value of professional services. To do so is to ignore that some services are routine and ordinary while others may be complex and extraordinary. To do so is to fail to acknowledge the skill and experience which may accomplish much in a short period of time.

Logically, it would seem that expeditiousness in bringing the task undertaken by the attorney to a successful conclusion, a factor seldom mentioned in the cases, ought to influence compensation as much or more than time actually consumed, for the Bankruptcy Act contemplates the prompt administration of estates with the least delay consistent with the legal rights of the parties.

Glove Paper Co. v. Morris Travis Drug Co.,
112 F. 2d 350 (6th Cir. 1940).

B. The Confusion Among the Circuits and the Importance of Dispelling That Confusion.

It is submitted that while the special panel in the present case is in conflict with the decisions of almost every United States Circuit Court of Appeals in having placed primary and almost sole emphasis upon time expended in determining the reasonableness of attorneys' fees under Section 241 of the Bankruptcy Act, the decisions of the various Circuits are inconsistent and in conflict with one another. As demonstrated above, a number of cases have sought to lay down formulae by which the courts may properly determine the reasonableness of the fee; others have considered, with or without the aid of a formula, one or another criterion to be controlling, or of paramount importance. Thus, while some courts have placed sole or primary emphasis upon the ability of the debtor to pay, others have considered the results achieved as the factor of greatest determinative weight. The ultimate result is one of confusion, conflict, and uncertainty.

In view of the importance of the problem in the administration of bankruptcy proceedings, and the ever increasing volume of bankruptcy litigation, it is submitted that the United States Supreme Court should establish the criteria by which the United States District Courts may uniformly and justly apply the standard of reason established by Section 241 of the Bankruptcy Act (11 U.S.C. § 641).

C. The Special Panel So Far Departed From the Accepted and Usual Course of Judicial Procedure as to Deny Petitioners Due Process of Law.

For the reasons stated above, Hon. Richard H. Chambers, Chief Judge of the Ninth Circuit, designated a special panel of senior federal judges from geographical areas other than California to hear the appeal from the order of the District Court. The special panel was comprised of Hon. James E. Major, Senior Judge, United States Court of Appeals for the Seventh Circuit;[1] Hon. Thomas F. McAllister, Senior Judge, United States Court of Appeals for the Sixth Circuit;[2] Hon. Walter J. LaBuy, Senior Judge, United States District Court for the Northern District of Illinois.[3]

It is striking that Judge Major has not engaged in the private practice of law for over half a century, and that Judges McAllister and LaBuy have not been engaged in the private practice of law for over a quarter of a century. Thus, the knowledge possessed by the members of the special panel of the current economics of the private practice of law, even in the geographical areas in which they regularly preside, is questionable. Their knowledge of the economics of the practice of law in California must have been derived solely from the record in this case, which overwhelmingly supported the award.

---

[1]Judge Major was born in 1887 and has not practiced law privately since 1912. Source: Liebman (Editor) "Directory of American Judges" (1955).

[2]Judge McAllister was born in 1896 and has not practiced law privately since 1937. Source: Liebman (Editor) "Directory of American Judges" (1955).

[3]Judge LaBuy was born in 1889 and has not practiced law privately since 1933. Source: Liebman (Editor) "Directory of American Judges" (1955).

The importance of the courts' possessing knowledge of the economic trends of the private practice of law has been well stated by Asa S. Herzog, Referee in Bankruptcy, Southern District of New York, in an article entitled "Bankruptcy Law — Modern Trends," 36, *Journal of the National Association of Referees in Bankruptcy,* 56, 57 (1962):

> "If economy is one side of the coin [in awarding attorneys' fees in bankruptcy proceedings], then fairness is surely the other side, for the workman is worthy of his meat and skilled attorneys are entitled to fair value of their services. While the court must keep one eye on economy, it cannot close the other to economics. With the cost of living spiralling up, fees generally must be revised upwards. A fair fee in 1900 would be grossly unfair in 1925 and a fair fee in 1932 would be inadequate in 1962. The referees and the judges, many of them out of private practice for years, should judicially notice the economic trends, particularly in their own geographical location. (One of the reasons why referees are required to have their offices *and* reside within the district of their appointment, is to insure the familiarity of the referee with local conditions. 2 Collier on Bankruptcy, p. 1363.)
>
> "In the '1958 Lawyer and the 1938 Dollar,' a report of the American Bar Association, it is pointed out that in the seven preceding years payroll costs jumped 52% and other costs jumped 65%. This state of affairs simply cannot be ignored. If compensation is not geared to modern conditions competent and diligent attorneys will not

be available in bankruptcy cases. [Citing: *In re Dunnhill Suspender & Belt Corp.*, 162 F. Supp. 608 (S.D. N.Y. 1958)]. Should attorneys of high standing and caliber turn away from bankruptcy as unprofitable and the practice fall into the hands of the less reputable and less competent, the creditors will foot the bill for improper, incomplete, and, perhaps, a tarnished administration. Such a result is to be avoided at all costs, and only a realistic appraisal of the value of legal services can prevent it."

Thus, while the members of the special panel *may* have "judicially noticed" the economic trends of the private practice of law in the geographical areas of the United States in which they regularly preside, it is submitted that they were totally unfamiliar with the economic trends of the private practice of law prevailing in the Southern District of California. Petitioners therefore submit, without in any way impugning the integrity, general skill, or fairness of the distinguished judges comprising the special panel, that the special panel was unqualified to substitute its judgment for that of the highly qualified trial court. Under all of the circumstances, had the special panel deemed that the award was excessive, due process of law could have been afforded petitioners only (1) by a remand of the case with instructions, if the panel had been so inclined, as to further proceedings at the fact finding level, or (2) a hearing *en banc* as suggested in the Petition for Rehearing pursuant to Rule 23 of the Court of Appeals for the Ninth Circuit.

Conclusion.

In conclusion, it is perhaps worthy of mention that as far as petitioners can determine, the Supreme Court of the United States has never invoked its right to review cases involving the question of attorneys' fees awarded under the Bankruptcy Act. Because of the importance of this matter to the District Courts and to the bar at large, and upon the grounds set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN J. QUINN, JR.,
Attorney for Petitioners.

APPENDIX A.

Findings of Fact, Conclusions of Law, and Order.

United States District Court, Southern District of California, Central Division.

In the Matter of Fox Markets, Inc., Desert Fair Markets, a corporation, McCown Drug Stores, Inc., Adelson, Inc., a Nevada corporation, McVay Corporation, Debtors. No. 122,455-TC. No. 122,456-TC. No. 122,457-TC. No. 122,458-TC. No. 123,267-TC.

The Applications for Compensation of WALTER ELY and STUART L. KADISON, Special Counsel for the Trustee in the above entitled matters, having come on for hearing before the undersigned United States District Judge on June 18, 1963 at the hour of 3:00 p.m., and having been heard on that date and on the dates on which it was resumed thereafter by the Court, to wit, on June 20, 1963, June 21, 1963, July 3, 1963, July 24, 1963, August 14, 1963, and August 23, 1963, and notice of the hearing of June 18, 1963 having been duly and regularly given to all parties in interest on June 7, 1963, and notice of the hearing of August 14, 1963 having been duly and regularly given to all parties in interest on July 30, 1963, and Applicants having appeared by themselves and by John J. Quinn, Jr., Esq., their attorney, and The Sperry and Hutchinson Company having appeared by its attorneys, Adams, Duque & Hazeltine by Lawrence T. Lydick, Esq., The Official Creditors' Committee of Fox Markets, Inc. having appeared by its attorneys, Nat Rosin, Esq. and Adams, Duque & Hazeltine by Lawrence T. Lydick, Esq., and the parties having stipulated on July 24, 1963 that all evidence, both oral and written, received by the Court in

the course of the proceedings commencing June 18, 1963 should be considered by the Court as part of the proceedings of August 14, 1963 and thereafter, and no parties in interest other than The Sperry and Hutchinson Company and The Official Creditors' Committee of Fox Markets, Inc. having appeared or objected to the application on June 18, 1963, August 14, 1963, or at any other time, and evidence, both oral and documentary, having been adduced, and the Court having considered all of the evidence, both oral and documentary, including, without limitation thereto, all of the records and files in the above entitled matters, all of which were introduced into evidence herein as an exhibit, and the verified Applications for Compensation by Special Counsel for Trustee, which were introduced into evidence herein as an exhibit, and oral argument having been waived, and the matter having been taken under submission by the Court, and the Court being fully advised, and good cause appearing therefor, the Court now makes its

FINDINGS OF FACT

as follows:

I

Prior to March 7, 1961, the Debtors designed above operated a chain of more than fifty (50) supermarkets and drug stores in southern California and Nevada with gross annual sales of approximately eighty million dollars ($80,000,000).

II

On March 7, 1961, the business of the Debtors was being operated at a loss of approximately one hundred thousand dollars ($100,000) per week, and on that date, proceedings looking to the arrangement of the affairs

of the Debtors were commenced under Chapter XI of the Bankruptcy Act. The arrangement proceedings were unsuccessful.

III

On March 7, 1962, petitions for reorganization of the Debtor corporations were filed under Chapter X of the Bankruptcy Act.

IV

Prior to March 7, 1962, and during the pendency of the Chapter XI proceedings, the lessors of supermarket store premises located in Woodland Hills, California and Las Vegas, Nevada, hereinafter referred to as Stores No. 7 and No. 62 respectively, had brought on separate legal proceedings against the Receiver to declare their leases breached and terminated and to oust the Receiver from possession.

Each of such proceedings had eventuated in determinations by the Referee in Bankruptcy that the leases had been breached and orders of the Referee in Bankruptcy terminating the rights of the Receiver to the possession of Stores No. 7 and No. 62 and directing the Receiver to relinquish possession of each of said stores to their respective landlords. Petitions for review of such orders were filed by the Receiver, and were pending before the undersigned United States District Judge on March 7, 1962 when the petitions for reorganization under Chapter X of the Bankruptcy Act were filed. On that date the Receiver remained temporarily in possession of Stores No. 7 and No. 62.

V

Upon the filing of the Chapter X proceeding, the landlords of Stores No. 7 and No. 62 separately sought to proceed under the judgments of the Referee in Bank-

ruptcy and to recover possession of said stores. On application of the Trustee, Messrs. Walter Ely and Stuart L. Kadison were appointed, severally, by this Court, as Special Counsel to the Trustee, to represent him in his efforts to retain possession of Stores No. 7 and No. 62 for the benefit of the estates of the Debtors. Such appointment was effected by order of this Court dated March 26, 1962.

VI

Thereafter, the landlords of Stores No. 7 and No. 62, each through diligent and qualified counsel, pressed proceedings before the Court seeking to secure possession of the two supermarkets. Messrs. Ely and Kadison, after diligent study and preparation, resisted such proceedings, the litigation extending in each instance over a period of many months. At the conclusion of each of the two matters in the United States District Court, the undersigned United States District Judge made and caused to be entered orders decreeing that neither the lease to Store No. 7 nor that to Store No. 62 had been terminated, and that the Trustee was entitled to continue in possession of both supermarkets. Thereupon, separate appeals were taken by each of said landlords to the United States Court of Appeals for the Ninth Circuit. From the date of their appointment to the date of the revesting of the estates on June 14, 1963 as part of the successful reorganization of the estates, the interest and possession of the Trustee in each of Stores No. 7 and No. 62 were protected and preserved through the efforts of Applicants, and Reorganized Fox Markets, Inc. continues in possession of both of said stores at the date hereof.

VII

Since March 26, 1962, Stores No. 7 and No. 62 have contributed more than ten per cent (10%) of the gross revenue of the estates, which operated at a profit during the period of the reorganization proceedings. The economically successful operation of the market chain during the period of administration under Chapter X was largely attributable to the retention of said stores. In the unsuccessful proceedings under Chapter XI, the retention of both Stores No. 7 and No. 62 had been an indispensable condition to the implementation of an arrangement plan put forward by Food Fair Stores, Inc. In the successful reorganization under Chapter X, Food Fair Stores, Inc., one of the largest retail grocery chains in the United States, purchased control of the Debtors and succeeded to the lessee's interest in Store No. 7 and No. 62. Should the pending appeals be decided in favor of the landlords, however, Food Fair Stores, Inc. will not have the rights to rescind its purchase.

VIII

But for the successful efforts of Applicants, Stores No. 7 and No. 62 would have been lost to the estates. Such loss would have greatly lessened the probability that a successful reorganization could have taken place, and it is probable that the proceedings would have resulted in an adjudication in bankruptcy and piecemeal liquidation. More particularly, at the time of the commencement of the proceeding, the unsecured creditors had a reasonable expectation of receiving approximately seven cents (7¢) for each dollar of indebtedness, or an aggregate of approximately $1,400,000. Under the reorganization, the unsecured creditors will receive assets

of a value of at least seventeen cents (17¢) for each dollar of indebtedness, or an aggregate of approximately $3,400,000, and assuming a continued successful operation under the control and with the support of Food Fair Stores, Inc., there is every possibility that the creditors will be paid in full. The ability of the Debtor to enter into so advantageous an arrangement with Food Fair Stores, Inc. was greatly enhanced by the retention, through the efforts of Messrs. Ely and Kadison, of Stores No. 7 and No. 62, and so favorable an arrangement could probably not have been made had it not been for their successful efforts as Special Counsel to the Trustee. Had they been unable to persuade the Court to conclusions contrary to those reached by the Referee previously referred to, both stores would have been lost to the Trustee, sales during the period of administration would have been diminished by approximately $9,000,000, the estates, which under the administration of the Trustee showed a profit, would have shown a loss in a crippling amount, and it is probable that the reorganization proceedings under Chapter X would have failed with the creditors receiving substantially less than they are to receive under the successful completed reorganization.

IX

On application of the Trustee, Messrs. Ely and Kadison were appointed, severally, by this Court, as Special Counsel to the Trustee, to represent him in resisting the efforts of the landlords of Store No. 38, in Goleta, California to set aside, on review to this Court, the order of the Referee in Bankruptcy holding that the lease on said Store had been properly rejected by the Receiver in the Chapter X proceeding. The efforts of

Messrs. Ely and Kadison were successful and the judgment of the Referee was sustained on review.

X

On application of the Trustee, Messrs. Ely and Kadison were appointed, severally, by this Court, as Special Counsel to the Trustee, to represent him in his pending litigation with Gallagher and Paxton and the Butternut Coffee Company, who claimed that they had been fraudulently induced to sell to Fox Markets, on the eve of bankruptcy, many thousands of dollars worth of Butternut Coffee on open account, and who sought to recover from the Trustee for the alleged fraud. The Trustee, with the help of his general counsel, was successful in resisting this claim before the Referee, and with the assistance of Messrs. Ely and Kadison was successful in resisting this claim on review to this Court.

XI

On application of the Trustee, Messrs. Ely and Kadison were appointed, severally, by this Court, as Special Counsel to the Trustee, to represent and advise him concerning the attempts of the landlords of Supermarkets No. 6 in Gardena and No. 53 in Goleta, California, to declare their leases breached and terminated. The Referee had ruled against the Trustee. On the advice of Messrs. Ely and Kadison that the ruling of the Referee in these matters was correct, the Trustee decided not to incur additional expense in litigating these matters, and entered into negotiations with the landlords which resulted in an adjustment of the dispute in a manner which inured to the benefit of the estates.

XII

On application of the Trustee, Messrs. Ely and Kadison were appointed, severally, by this Court, as Special Counsel to the Trustee, to represent him in litigation with the Pessin Grocery Company, which claimed that he, as Trustee, was bound to a stipulation made by him while acting as Receiver. After a hearing, the Referee in Bankruptcy and Special Master had recommended to this Court that the Trustee be held bound by the stipulation of the Receiver. A substantial liability would have resulted to the estates had the Court followed the recommendation of the Referee and Special Master. Messrs. Ely and Kadison brought the matter on for a hearing before this Court upon the report and recommendation of the Referee and Special Master. After hearing, argument and briefing, the Court declined to follow the report and recommendation of the Referee and Special Master. The effect of the order resulted in substantial savings to the estates.

XIII

The matters in which Messrs. Ely and Kadison rendered services were uniformly difficult, and involved large sums of money and large potential benefits and liabilities to the estates. The successful management of such matters required great skill, and great skill was employed by each of Messrs. Ely and Kadison. All matters were of a pressing nature, requiring, and receiving, immediate, devoted, and consuming attention. The efforts of Messrs. Ely and Kadison were, as hereinabove more fully appears, in each instance successful, and resulted in substantial benefit to the estates. Messrs. Ely and Kadison are both mature, well educated

and trained, and highly experienced in the trial of litigated matters in the United States District Court. The intricacies and importance of the litigation were such that their assignments herein necessitated skilled legal training and ability.

In meeting his responsibility herein, time records maintained for Mr. Ely reflect an expenditure of 134.5 hours, but Mr. Ely expended no less than 269 hours of his individual time. Mr. Kadison expended no less than 303.4 hours, and his associates, Russel I. Kully and Daniel S. Mark, expended no less than 230.9 hours and no less than 2.9 hours respectively. Both Mr. Ely and Mr. Kadison are members of the legal profession of high standing, and were opposed in each matter of litigation undertaken for the Trustee by counsel of energy and ability. The employment of Messrs. Ely and Kadison had a contingent aspect in that, had their efforts in behalf of the Trustee been unsuccessful, it is unlikely that the estates would have been in a position to pay reasonable and fair compensation for their services. Their employment was casual, and not permanent or for an established and constant client.

XIV

The reasonable value of the services rendered by Mr. Ely as Special Counsel to the Trustee is eighty-five thousand dollars ($85,000), and the reasonable value of the services rendered by Mr. Kadison as Special Counsel to the Trustee is eighty-five thousand dollars ($85,000).

XV

No improper agreement or understanding has been made between either Mr. Ely or Mr. Kadison, and any

other person whomsoever for a division or share of the compensation to be allowed or paid or to be paid for services rendered in or in connection with the reorganization proceedings. Both of Messrs. Ely and Kadison have undertaken to make no division of fees prohibited by section 62 of the Bankruptcy Act.

The Court makes its

CONCLUSIONS OF LAW

as follows:

I

Walter Ely and Stuart L. Kadison were duly and regularly appointed as Special Counsel to the Trustee in the estates hereinabove described.

II

Proper notice of the hearings upon the Applications for Compensation of Messrs. Ely and Kadison was duly and regularly given according to law.

III

The reasonable value of the services rendered to the Trustee by Walter Ely is eighty-five thousand dollars ($85,000), and he is entitled to be paid such sum by the Trustee forthwith.

IV

The reasonable value of the services rendered to the Trustee by Stuart L. Kadison is eight-five thousand dollars ($85,000), and he is entitled to be paid such sum by the Trustee forthwith.

V

No agreement or understanding for a division of fees prohibited by section 62 of the Bankruptcy Act, or by any other law, has been made by either Walter Ely or Stuart L. Kadison.

ORDER

In accordance with the foregoing Findings of Fact, and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

1. Walter Ely is hereby awarded the sum of eighty-five thousand dollars ($85,000) as and for his reasonable attorney's fees for services rendered to the Trustee as Special Counsel in accordance with the orders of the Court heretofore made;

2. Stuart L. Kadison is hereby awarded the sum of eighty-five thousand dollars ($85,000) as and for his reasonable attorney's fees for services rendered to the Trustee as Special Counsel in accordance with the orders of the Court heretofore made;

3. The Trustee, Irving Sulmeyer, and reorganized Fox Markets, Inc. are directed to pay the attorneys' fees provided in paragraphs 1 and 2 hereof to Walter Ely and Stuart L. Kadison forthwith;

4. The Clerk is directed to enter this order.

Dated: September 5, 1963.

/s/ Thurmond Clarke
United States District Judge

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

The Official Creditors' Committee of Fox Markets, Inc., Appellants, vs. Walter Ely and Stuart L. Kadison, Appellees. No. 18,923.

[October 20, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division. Before: MAJOR and McALLISTER, Senior Circuit Judges, and LA BUY, Senior District Judge.*

MAJOR, Senior Circuit Judge.

On June 7, 1963, Walter Ely and Stuart L. Kadison, appellees (claimants), filed in the United States District Court for the Southern District of California, Central Division, an application for the allowance of attorney fees in the amount of $200,000 ($100,000 for each claimant), for services rendered as associate counsel for the trustee in a proceeding for reorganization of Fox Markets, Inc. (debtor), under Chapter X of the Bankruptcy Act (11 U.S.C.A. Sec. 656).

Objections to the claim were interposed by the Official Creditors' Committee of the debtor corporation (appellants). On September 4, 1963, after extended hearings, the Court made its findings and conclusions and entered its order awarding each of the claimants the sum of $85,000 as and for his reasonable attorney

*Judge Major of the Seventh Circuit, Judge McAllister of the Sixth Circuit and Judge La Buy of the Northern District of Illinois, all sitting by designation.

fees for services rendered to the Trustee. From this order the Creditors' Committee appeals.

The jurisdiction of this Court is based upon Sec. 250 of the Bankruptcy Act (11 U.S.C.A. Sec. 650), and that of the District Court upon Sec. 241 of the same Act (11 U.S.C.A. Sec. 641). The latter section provides, so far as herein material:

> "The judge may allow * * reasonable compensation for services rendered * * in a proceeding under this chapter — * *
>
> (3) by the trustee and other officers, and the attorneys for any of them * *."

The ultimate question for decision is whether the allowances made by the District Court were reasonable within the contemplation of the Bankruptcy Act. Claimants argue in support of the award, and the Creditors' Committee to the contrary. In doing so, the latter contends that the fee allowance was grossly excessive, so much so that as a matter of law it constituted an abuse of discretion by the District Court and was clearly erroneous.

Due consideration to the history and purpose of the Bankruptcy Act, a careful study of the voluminous record before us and the many cases called to our attention which have considered and dealt with similar problems lead us to the definite conviction that the allowances were clearly excessive and must be substantially reduced. The importance of the conclusion thus reached suggests a discussion of the situation in some detail.

A brief statement of the proceedings prior to the time claimants were appointed as associate counsel for the Trustee is pertinent. On March 7, 1961, a petition

was filed by debtor, then engaged in the operation of a large chain of markets, for leave to file proceedings under Sec. 322, Chapter XI of the Bankruptcy Act (11 U.S.C.A. Sec. 722), which on the same date was allowed by the Court. Throughout this proceeding, Irving Sulmeyer was the duly appointed Receiver in Bankruptcy of the debtor, and the law firm of Buchalter, Nemer, Fields and Savitch was his duly appointed attorneys (hereinafter referred to as the Nemer firm).

The store properties of the debtor at the time of the commencement of the proceedings were some 54 in number, variously located, and all held under lease. The stores most involved in this controversy are known as No. 7 and No. 62. While the aforesaid arrangement proceedings were pending, the lessors of Stores Nos. 7 and 62, respectively, sought termination of their leases and reclamation of the premises. On December 5, 1961, after hearing, the Referee made his order, supported by findings of fact and conclusions of law, terminating the leases as of April 12, 1961, and decreeing that the lessors were entitled to possession. A petition for review was filed by the Receiver, and the enforcement of the Referee's order was suspended pending a ruling on the petition for review.

While this petition was pending, the debtor, on March 7, 1962, filed a petition for reorganization under Chapter X of the Bankruptcy Act, which on the same date was approved by the Court, and Sulmeyer who had served as Receiver under the Chapter XI proceeding was appointed Trustee. On March 9, 1962, the Court authorized the Trustee upon his application to employ the Nemer firm, who had represented him in his capacity as Receiver in the Chapter XI proceedings. The Trustee's

application stated among other things that said attorneys were "fully familiar with the said presently pending matters" before the Referee and the Court, and "have represented your applicant, as Receiver, in said matters"; that in addition thereto, the services of the law firm were needed to "defend suits and proceedings concerning the assets of the said estates" and to take all necessary and proper steps in other matters "connected with the affairs of the said estates"; and that the said attorneys "had considerable experience in these matters," were "well qualified" to represent the Trustee in the proceedings, and had "extensive familiarities with the matters" involved in the prior proceedings.

On March 26, 1962 (seventeen days later), the Trustee applied to the Court "to employ attorneys for specified purposes." His application pointed out that the two review proceedings involving Stores Nos. 7 and 62 were then pending before the Court. The need for additional counsel was described in the Trustee's application, "in order that a completely new approach to the above mentioned matters may be taken * *, your applicant wishes to employ Walter Ely and Stuart L. Kadison as associate counsel * * for the specific purpose of representing your applicant in the matters set forth above." On March 26, 1962, the Court granted the application and appointed claimants associate counsel as requested.[1] It may be noted that this was claimants' first connection with the proceedings which had then been pending in court in one form or another for more than a year.

---

[1]Claimants were subsequently employed for certain other limited purposes which are comparatively insignificant insofar as the instant case is concerned.

On May 14, 1962, a stipulation was entered into in open court between claimants as associate counsel and the Nemer firm as general counsel, all representing the Trustee, counsel for the debtor and counsel for the lessors in Stores Nos. 7 and 62, by which it was agreed that the petitions for reclamation filed by the lessors in the Chapter X proceeding be heard on the record made before the Referee in the Chapter XI proceeding. Briefs were filed by the respective parties and a court hearing had on the lessors' petitions for reclamation, resulting in a decision adverse to the lessors, each of which prosecuted appeals to this Court. On December 28, 1962, Sulmeyer, by the Nemer firm as his attorneys, filed a proposed plan of reorganization of Fox Markets, Inc. and its subsidiary debtors. On February 12, 1963, the Court entered an order approving the plan of reorganization, and the name of the debtor became Reorganized Fox Markets, Inc.

In the successful reorganization, Food Fair Stores, Inc., one of the largest retail grocery chains in the United States, purchased control of the debtor and obligated itself to "provide funds or assets for expansion, remodeling and working capital in an amount up to $4,000,000." The approved plan enumerated the stores included therein, but expressly excepted Stores Nos. 7 and 62.

On June 7, 1963, claimants filed a joint application for compensation. This was subsequent to the date of the approval of the plan of reorganization and during the pendency of the two lessor appeals in this Court.[2]

---

[2]The record discloses that on September 11, 1963, the appeal as to Store No. 7 was dismissed on stipulation of counsel. We were advised on oral argument that the appeal as to Store No. 62

The hearing on this application commenced June 18, 1963, despite a motion for continuance by the Creditors' Committee, repeatedly renewed, on the basis that adequate time had not been allowed for preparation. The hearing continued on June 20, June 21 and July 3, 1963. In the meantime, counsel for the Committee sought from this Court a writ directing the Trial Court to grant a continuance which, on July 23, 1963, was allowed on the basis that notice of the hearing was not in compliance with the Federal Rules of Civil Procedure. On the day following, counsel agreed that all evidence previously received might be considered and the hearing was continued to August 14, 1963. At the conclusion of the hearing, on August 23, the Court announced that it would allow $85,000 to each claimant, or a total of $170,000.

In their application for an allowance in the sum of $200,000, claimants place great stress upon their services rendered in connection with Stores Nos. 7 and 62. They allege that the retention of these stores was "an indispensable condition" to the implementation of any plan; that without the successful services of claimants both of these markets would have been lost; that the sales and profits would have been lost; that the probability of a successful reorganization would have been "greatly lessened"; and that the entire proceedings would have fallen into an "adjudication in bankruptcy and piece-meal liquidation." They allege that the questions involved were novel and difficult, and in support thereof incorporate by reference "all papers, plead-

---

was subsequently dismissed. The final disposition of these two stores is not disclosed but, as noted, they had previously been excluded from the approved plan of reorganization.

ings, testimony, depositions and other material" in both the Chapter XI and Chapter X proceedings. They allege that at the time of the initiation of the Chapter XI proceedings there were about 1,500 creditors, some of whom "might have employed" one or both of the claimants; that at the time they assumed their responsibilities the value of the debtor estates was $8,000,000, with $20,000,000 of claimed obligations, and that it is estimated that "by virtue of the successful reorganization" there will be a substantial net worth rather than the insolvent condition existing at the time of the filing of the Chapter XI proceeding "and existing at the time of the employment of your Applicants herein." They allege with respect to "the contingency or the certainty of the compensation" that when they were appointed there was "no certainty" that they would receive reasonable and fair compensation for their services; that had they been unsuccessful with respect to Stores Nos. 7 and 62, "all hope of successful reorganization would have vanished, the Debtors would have collapsed under bankruptcy proceedings," and that claimants would have been inadequately compensated, "if compensated at all."

Claimants attached to their application time sheets showing the number of hours expended by each of them on behalf of the Trustee. These sheets reveal that between March 22, 1962 and May 20, 1963, Ely spent 128.5 hours in connection with Stores Nos. 7 and 62, and 6 hours with other matters, or a total of 134.5 hours. Based on the requested fee allowance, he thus valued his services at $743.00 per hour. During the same period of time, Kadison spent 258 hours in connection with the two stores and 45.4 hours with other matters.

He also listed 200.8 hours spent by Kully (a law assistant) in connection with the two stores, and 33 hours on other matters. Thus, Kadison claimed a total of 537.2 hours, including time spent by his assistant. Based on the requested fee allowance, Kadison valued his services and those of his assistant at approximately $186.00 per hour.

Neither claimant Ely nor claimant Kadison's law assistant testified at the hearing in the instant matter. Kadison testified, "Mr. Ely does not keep time sheets * * and so I kept a record of Mr. Ely's time." Notwithstanding that Ely kept no time record but depended on that kept by Kadison, Ely alleged in his application "that he expended no less than twice the time which is indicated on said exhibits, attached hereto, as having been expended by him." Without any proof of this allegation, the Trial Court found the time spent by Ely to be 269 hours, rather than the 134.5 hours shown by the time sheets.

The award allowed by the District Court valued the services of Ely at $316.00 per hour, based on the allegation of his application as to time spent ($632.00 per hour, based on the time sheet), and the services of Kadison (including time spent by his law assistant) at $140.00 per hour.

Section 241 of the Bankruptcy Act imposes a standard of reasonableness in fee allowances to trustees and their attorneys. The test of reasonableness reflects a Congressional policy, based upon an extensive history, opposed to the allowance of excessive or exorbitant compensation. The Supreme and other Courts have time and again emphasized this Congressional policy, and all through the cases the guiding test is that of economy.

In Realty Associates Securities Corp. et al. v. O'Connor et al., 295 U.S. 295, 299, the Court characterized referees in bankruptcy as officers of the Court and stated, "Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. [Citing cases.] Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils." Some of the many other cases to the same effect are Callaghan et al. v. Reconstruction Finance Corp., 297 U.S. 464, 468-469; Wolf et al. v. Weinstein et al., 372 U.S. 633, 639. Obviously, under Sec. 241, the Supreme Court admonition as to referees is equally applicable to their attorneys. Finn et al. v. Childs Co., 181 F.2d 431, 435, and cases cited therein.

In our view, the fallacy of the theory advanced by claimants, reflected in the testimony of their witnesses and evidently embraced by the Trial Court, is that the time element as a factor in determining a reasonable allowance was relegated to one of minor importance. We think the cases abundantly support the premises that where fees are sought by an officer of the Court under Sec. 241, the time element is of major importance, although there are other factors which may be given consideration.

In Chicago and West Towns Railways, Inc. v. Friedman et al., 230 F.2d 364, 367 (7th), the Court in discussing fee allowances under Sec. 241 (11 U.S.C.A. Sec. 641) stated, "Reasonable fees for such services depend largely on the hours spent and the allowance per hour." In contrast, the Court pointed out that under Sec. 242, compensation is allowable only where "The services must be beneficial to the estate." To the same ef-

fect, In re Solar Mfg. Corp., 206 F.2d 780, 781. See also London et al. v. Snyder, 163 F.2d 621, 626; Dickinson Industrial Site, Inc. v. Cowan et al., 309 U.S. 382, 389; In re Food Town, Inc., 208 F. Supp. 139, 145.

In Newton et al. v. Consolidated Gas Co. et al., 259 U.S. 101, the Court considered fee allowances made to a Master who was serving as an officer of the Court, just as claimants were in the instant matter. The Court made the pertinent observation (page 105), "He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed and the responsibility assumed. His compensation should be liberal, but not exorbitant."

While Newton in some respects is distinguishable from the case before us, we think it pertinent that the Court in considering the reasonableness of the Master's compensation based its conclusion primarily upon the time claimed to have been expended. The Court drastically reduced the compensation allowed and emphasized that it was "fifteen times the salary of the trial judge and eight times that received by justices of this court." It further compared the award to the salaries of the Mayor of New York City, the Governor and members of the Court of Appeals of the State, and the Supreme Court in the City of New York. In this connection it stated (page 106), "Although none of these can be taken as a rigid standard, they are to be considered when it becomes necessary to determine what shall be paid to an attorney called to assist the court.

His duties are not more onerous or responsible than those often performed by judges."

In the instant matter, the compensation awarded to those called to assist the Court was the equivalent of that received for more than seven years by the judge who made the award, and equals the combined compensation of a three judge panel of this Court for almost two years. The amount of the allowance on its face was violative of the statutory standard and was an abuse of the Court's discretion. Dickinson Industrial Site, Inc. v. Cowan et al., 309 U.S. 382, 389; Newton et al. v. Consolidated Gas Co. et al., 259 U.S. 101, 105; In re Solar Mfg. Corp., 206 F.2d 780, 781; Coskery v. Roberts & Mander Corp., 200 F.2d 150, 154.

As already noted, the Nemer firm represented Sulmeyer as Receiver from the inception of the Chapter XI proceeding, and was again employed by order of Court to represent him as Trustee under the Chapter X proceeding. It is conceded by all that this is an able and distinguished firm, thoroughly familiar with every facet of the debtor's involved situation. Notwithstanding, claimants were appointed as associate counsel for the sole stated purpose of taking a "new approach" to certain matters involved. This was not a sound reason for burdening the estates with additional counsel. We need not labor this point because it is conceded that claimants are entitled to reasonable compensation for the services rendered. Even so, we think the circumstances of their employment may properly be taken into consideration in making such determination.

Without intending to cast any reflection upon the professional standing of claimants, we are forced to the conclusion that the importance of their services as well

as the results obtained are greatly exaggerated. One of their notable achievements, so it is asserted, was their "ability to persuade" attorneys for interested parties to enter into a stipulation (heretofore described) so that the petitions for review then pending relative to the two stores in question could be treated as petitions by the landlords for reclamation. As to this stipulation claimants in their brief state, "Its effect was to deprive the lessors of the benefit of orders theretofore made by the Referee and to place the matter of reclamation at large, to be examined by the District Judge de novo, unrestricted by previous rulings." All we find in the record regarding this stipulation is that counsel for interested parties, including claimants, and counsel for the landlords, while waiting for the Court to dispose of another matter agreed to the stipulation and it was dictated into the record.

The rights of the parties under the two leases depended upon their construction and presented an issue of law. The facts were not in dispute and if the matter had been heard on the petitions for review, the Court would have been unfettered by the Referee's findings. We have studied the briefs submitted by claimants on behalf of the Trustee (substantially the same as to both leases) and the opposing brief by lessors, and we think the question for decision was no more difficult than those which often confront courts and lawyers. We believe that its presentation could have been made as effectively, and the same result achieved, by the Trustee's general counsel or any competent lawyer. To think otherwise is to reflect upon the competency of general counsel to present the issues adequately, as well as upon the ability of the Court to render a correct decision.

Claimants, relying upon Rule 52(a) of the Federal Rules of Civil Procedure, place much emphasis upon the findings of the Trial Court. In an attempt at some brevity, we shall note only those which may be regarded as crucial. The Court found that Stores Nos. 7 and 62 contributed more than 10% of the debtor's gross revenue; that as a result of the retention of these two stores the estates operated at a profit during the reorganization proceedings; that Food Fair Stores, Inc. purchased control of the debtor's estates, including its interest in the leased stores;[3] that but for the successful efforts of claimants the two stores would have been lost to the estates, which would have greatly lessened the probability that a successful reorganization could have taken place, with the result of adjudication in bankruptcy and piecemeal liquidation, and that it was through the efforts of claimants that the debtor was enabled to make such advantageous arrangements with Food Fair; that if they had been "unable to persuade the Court to conclusions contrary to those reached by the Referee, both stores would have been lost to the Trustee" and the reorganization proceedings probably would have failed; and that the intricacies and importance of the litigation were such as to require skilled legal training and ability.

Some of these findings are without support in the record, while others are conclusions of law, ultimate findings or mixed findings of fact and law, and are not binding upon a court of review. Among many cases on this point see Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704, 706; Cordovan Associates, Inc. v.

[3]As subsequently shown, Stores Nos. 7 and 62 were excluded from the plan of reorganization as approved.

Dayton Rubber Co., 290 F.2d 858, 860; Gediman v. Anheuser Busch, Inc., 299 F.2d 537, 547; Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491.

These findings furnish the basis for the argument here, (1) that the legal questions relative to the two store leases were intricate and difficult of solution, (2) that it was through claimants' remarkable ability and skill that the Court was persuaded to render a decision adverse to the lessors, and (3) that a decision in favor of the lessors would have resulted in the loss of the stores by the debtor and would have prevented any plan of reorganization. We have previously discussed (1) and (2), and now turn to (3).

Assuming that the retention of the two stores was important to the debtor, it does not follow that they were essential to a plan of reorganization; in fact, the record demonstrates conclusively to the contrary. True, Trustee Sulmeyer testified that during the proceedings under Chapter XI, long before claimants entered the case, he regarded the retention of the two stores as crucial to an arrangement, and without them there might have been an adjudication in bankruptcy. However, at the hearing in the instant matter he stated, "I think today it is not as crucial as it was a year and a half ago." The fact that the plan of reorganization specifically excluded these two stores completely demolishes the contention that Food Fair regarded them as essential. The Trustee testified:

> "Q. And as a matter of fact, in the ultimate conclusion they didn't require these two stores, did they?
>
> A. No, sir.

Q. The present plan does not require the inclusion of those two stores, does it?

A. I refused to propose a plan to this court that would require that condition, and they agreed with my bargaining.

Q. When it was all brought out, they didn't require these two stores at all?

A. The plan does not so require it."

Witness Nigg, called by the Creditors' Committee, who served as chairman of a negotiating committee during the proceeding, testified without dispute that the retention of the two stores was not essential to a plan of reorganization and that the principal executive of Food Fair had so stated. In this connection it is pertinent to note that an executive of Food Fair attended the hearings but was not called as a witness by claimants to contradict the testimony of Nigg. That the purchase by Food Fair of a controlling interest in the debtor's estates was not dependent upon the inclusion of the two stores was recognized by the Court in its finding, "Should the pending appeals be decided in favor of the landlords, however, Food Fair Stores, Inc. will not have the rights to rescind its purchase."

The plan of reorganization was approved February 12, 1963, and the order appealed from entered September 4, 1963. The record discloses that one of the lease appeals pending in this Court was dismissed September 11, 1963, and we are advised, without record support, that the other was dismissed February 7, 1964. It evidently followed from the dismissal of the appeals that the decision of the District Court relative to the two leases became final. Prior thereto, as shown, the

plan of reorganization had been approved, by which Food Fair agreed to pay a designated amount for debtor's properties either with or without these two stores. It cannot be held on this record, as urged by claimants, that the benefit derived from the retention of the two stores inured to the creditors. It appears more likely that Food Fair by reason of the terms of the plan of reorganization reaped the benefit.

The Court agreed with claimants' contention that their employment was on a contingent basis and that all probability they would have received little or no compensation unless they succeeded in preserving the two stores for the estates. The point is without merit; in fact, it appears to be an afterthought. At the time of claimants' employment the debtor had more than $2,000,000 cash on hand, with free assets of some $16,000,000. There was no reason to doubt, then or later, that the Court would award and that they would receive reasonable compensation as provided by statute. See Levin v. Barker, 122 F.2d 969, 973. More important, a contract of employment between a Trustee in Bankruptcy and an attorney, for fees based on a contingent basis, is invalid. Watkins, Trustee, et al. v. Sedberry et al., 261 U.S. 571, 575.

Claimants make the point that if the debtor had been adjudicated a bankrupt, the unsecured creditors had only a reasonable expectation of receiving $.07 for each dollar of indebtedness but that under the reorganization they will receive assets of a value of $.17 on each dollar of indebtedness. This contention is based upon the testimony of Sulmeyer who gave these estimates as a matter of opinion, but he also testified that the amount which the creditors might receive on reorganization was

to be paid in stock and that "it is hard to tell what the stock will be worth on the open market." It is not discernible how this speculative testimony is of any aid to claimants, particularly in view of the fact that the plan of reorganization became effective either with or without the two stores which claimants contend they saved for the estates.

Claimants attach importance to a finding that the gross income of all of the debtor stores amounted to some $10,000,000 per year and that Stores Nos. 7 and 62 were responsible for some 10% of this gross income. No mention is made of the fact, as testified to by Sulmeyer, that the net profit derived from all the stores during the period of claimants' employment was between $85,000 and $100,000 and the witness was not sure whether this was before or after depreciation. What portion of this net profit was derived from Stores Nos. 7 and 62 is not shown. Assuming that they contributed the same proportion to the net income as they did to the gross, it would seem that they contributed to the former some $8,000 or $10,000. Any benefit inuring to creditors stemmed from the net rather than the gross income. The point as a factor in determining reasonable compensation has little, if any significance.

The contention by claimants that they rendered services in connection with matters other than those relating to Stores Nos. 7 and 62, which were included in the total amount of fees requested, is also of minor importance. As previously shown, the time sheets attached to their claim showed 6 hours were spent by Ely in connection with other matters, 45.4 hours by Kadison, and 33 hours by a law clerk. Kadison as a witness admitted, "Far away the greatest portion of our fee

was earned, we feel, by reason of our services in Store No. 7 and Store No. 62." In the absence of enlightment on the character of services performed on other matters, we assume that they could have been properly performed by any good lawyer.

We now turn to the testimony of Trustee Sulmeyer and J. E. Simpson, the two witnesses relied upon in support of the fee allowance. The testimony of the former is saturated with conclusions and opinions. He testified, "If this Court were to award them $200,000, this estate would not have been treated unfairly," but "a fee of substantially less would be reasonable" and if their requests were cut in half, "they would not be underpaid for their services in this Court." He further testified that if claimants had been unsuccessful in retaining Stores Nos. 7 and 62, they would have been entitled to "a very modest or nominal fee," and that he considered their employment was "contingent." Consistent with his contingent fee theory, he stated that he gave minor consideration to the amount of time expended. Without further comment, we think our previous discussion has obliterated the premise upon which the testimony of this witness was predicated and that it furnishes little, if any, support to claimants' position.

The testimony of Simpson occupies some 65 pages of the reporter's transcript. In response to a long, hypothetical question, he expressed the opinion that the total reasonable value of the services rendered by claimants and their law assistants would range from $175,000 to $225,000. At the conclusion of his testimony the Court stated that it would allow $85,000 for each lawyer, or a total of $170,000. It arrived at this figure by subtracting $5,000 from the minimum of $175,000 re-

ferred to by Simpson, because the matter involved a bankruptcy rather than a private proceeding. An analysis of the hypothetical question to which Simpson responded would unduly burden this opinion. We think it sufficient to state that the question contains numerous unproved assumptions and, even more important, the theories and conclusions relied upon by claimants which we have previously rejected. It is our view that the opinion expressed by Simpson is without probative value.

The Creditors' Committee introduced the testimony of Marion W. Engleman and Oscar A. Trippet on the reasonable fee issue. Both were attorneys and qualified to express an opinion. Engleman testified that the customary charge for trustees' attorneys and others in a similar position was not more than $50.00 an hour; that the customary practice was to charge on an hourly basis, and that the hourly rates took into consideration such factors as time spent, the novelty and difficulty of the questions involved, the skill of the attorney, the amount involved and the benefit received.

Trippet, a long time practitioner, testified that the customary charge of the Bar for trial and appellate work was between $50 and $60 an hour, going down for beginning attorneys to $20 an hour. He stated as his opinion that the services of Ely were worth $12,000, those of Kadison $22,500 and those of the latter's law assistant $6,800. The witness figured Ely's services (135 hours) at $60 an hour for straight time and, on the assumption that his services were of extreme value, added 50%. He figured Kadison's services (300 hours) at $50 an hour, and in view of the allegations of the claim added 50%. He figured the compensation for Kadison's law assistant at $20 an hour.

The witness testified that he considered the time spent the most important measuring stick but, on the assumption that the statements in claimants' application for compensation were accurate and that a valuable service had been rendered, he increased the hourly rate accordingly. With reference to the litigation relative to the two leases, he stated that he had examined the briefs and thought that the presentation of the issues involved required no particular legal ability.

We doubt if it would serve any useful purpose — certainly it would unduly burden this opinion — to cite or discuss the numerous cases called to our attention. As was stated in London et al. v. Snyder, 163 F. 2d 621, 625, "Compensation allowed others in the same proceeding or in other reorganizations affords little or no evidence of the reasonableness or reverse of an order of allowance under review on appeal." Reference to a few of such cases is illustrative of the theory, previously noted, that the time expended is an important element in determining a reasonable fee award under the Bankruptcy Act.

In Finn et al. v. Childs Co., 181 F. 2d 431, Trustee's counsel devoted 28,905 hours to the reorganization and the District Court allowed compensation at the rate of $18.50 an hour, which the Court of Appeals held excessive. In London et al. v. Snyder, 163 F. 2d 621, Trustee's counsel devoted 757 hours to the reorganization and the District Court allowed a fee of $25,500, or about $33 an hour, which the Court of Appeals held excessive. In In re Food Town, Inc., 208 F. Supp. 139, Trustee's counsel devoted 3,029 hours to the reorganization and was awarded $77,500, or about $22 an hour. In In re American Tissue Mills, 120 F. Supp. 950,

Trustee's counsel performed 417 hours' service and was awarded a fee of $5,000, or about $12 an hour. In Spence v. Dowd, 145 F. 2d 451, Trustee's counsel spent nearly 1,200 hours and the District Court awarded compensation in the amount of $6,750, or a little more than $5 an hour, which the Court of Appeals affirmed.

Claimants cite cases in support of the rule that orders determining compensation will not be disturbed on appeal absent a clear showing of an abuse of discretion. These cases are of no help to claimants on the record here. In Blanch v. Rankin, 291 F. 2d 217, 219, the Court affirmed the lower Court's award of $950 to the attorney for the Trustee, who had claimed $3,950. In In re Paramount Merrick Inc., 252 F. 2d 482, the Court affirmed the lower Court's award of $950 to the attorney for the Trustee, who had sought $3,500. In In re Lustron Corp., 196 F. 2d 475, special counsel for the Trustee requested an allowance of $17,200 for 430 hours of service. The Referee allowed $10,000, or $23 an hour, as the "fair, usual and customary charges," which was approved by the District Court and affirmed by the Court of Appeals.

Claimants also cite cases in which larger awards have been sustained than in the instant case. Like the other cases, they are of little help. In Surface Transit, Inc. et al. v. Saxe, Bacon & O'Shea et al., 266 F. 2d 862, the Court affirmed an award of $800,000 to a firm of lawyers who served as general counsel for the Trustee in a reorganization proceeding. The Court stated that they had rendered highly involved and complex legal services for a period of ten years. In In re Central States Electric Corp., 112 F. Supp. 281,

counsel for the Trustee was allowed a fee of $250,000 in a reorganization proceeding which had extended over a period of eleven years. In In re Midland United Co., 64 F. Supp. 399, counsel for the Trustee was awarded $250,000 in an utility reorganization which had been in Court for more than eleven years, to which the attorney had devoted 11,257 hours.

As we have shown, there is no substantial basis in the record for the fee allowance as made by the District Court. It was clearly excessive. Having so concluded, we are faced with the difficult problem of determining a reasonable fee within the contemplation of the Bankruptcy Act. Taking all pertinent factors into consideration, it is our judgment that a total award of $50,000 would be fair and reasonable. This is at the rate of $74.00 an hour for all time expended by the claimants, including Kadison's law assistant, as shown by their time sheets, or, if we accept Ely's allegation that he spent twice as much time as shown by the time sheets, this allowance for all time spent is at the rate of $62.00 an hour.

The order appealed from is modified by providing a total compensation of $50,000 for claimants, to be apportioned as they see fit. As so modified the order is

AFFIRMED.